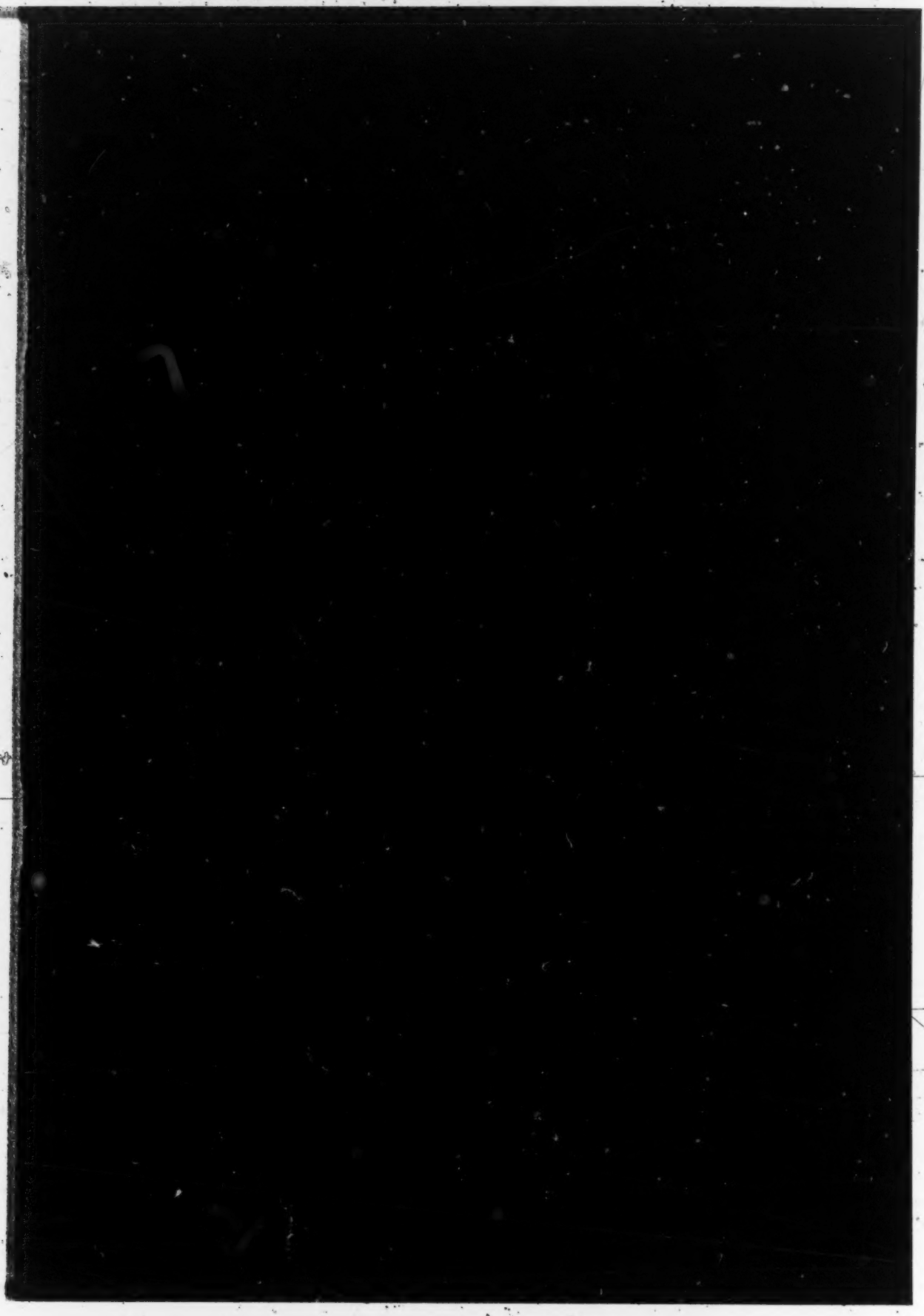

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

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No.

---

NEWELL H. SMITH, JR.,
Petitioner,

versus

NOBLE DRILLING CORPORATION,
Respondent.

---

# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

---

TO THE HONORABLES, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner, Newell H. Smith, Jr., a merchant seaman, prays that a writ of certiorari issue herein to review the judgment and decree of the Louisiana Supreme Court rendered against petitioner on June 30, 1967. (Appendix "C")

## OPINIONS BELOW

The opinion of the court of first instance, the Civil District Court for the Parish of Orleans, Louisiana,

dismissing petitioner's suit, is unreported; it is printed in full as Appendix "A" hereof.

The opinion of the Louisiana Court of Appeal, Fourth Circuit, affirming the dismissal, is reported in 199 So. 2d 36 (1967) and is re-printed as Appendix "B" hereof.

The opinion and decree of the Louisiana Supreme Court, refusing a writ, is reported in 200 So. 2d 666 (1967) and is re-printed as Appendix "C" hereof.

## JURISDICTION

On June 30, 1967, the Supreme Court of Louisiana refused a writ of certiorari to the Louisiana Court of Appeal, Fourth Circuit to review its judgment and opinion adverse to petitioner on May 1, 1967 (rehearing denied June 5, 1967).

The decisions and decrees of these state courts involved interpretation and application of general maritime law principles to the alleged personal injury claims of petitioner as a merchant seaman.

Therefore, the jurisdiction of this Honorable Court is invoked pursuant to the provisions of 28 U.S.C.A. 1257 (3); June 25, 1948; c. 646, 62 Stat. 929.

## QUESTIONS PRESENTED

There is only one question presented by this petition, to-wit:

Under the general maritime law of the United States, if a seaman is injured by the alleged joint conduct of his employer and a third party, may he settle with his employer and effectively reserve and retain his rights against the third party?

## CONSTITUTIONAL PROVISIONS AND STATUTES

There are no statutes or constitutional provisions, *per se*, involved in this matter.

The principles of law construed and applied emanate from the body of non-statutory general maritime law of the United States to which the federal judicial power is extended by Article III, §2 of the United States Constitution.

The state courts below acquired jurisdiction of the instant subject matter by virtue of the so-called "saving-to-suitors" clause of 28 U.S.C.A. 1333 (1).

## STATEMENT OF THE CASE

Petitioner, Newell Smith, Jr., was employed by Service Contracting, Inc., as a member of the crew of a petroleum production tender-vessel in the Gulf of Mexico. He was injured and began suit in the Civil District Court for the Parish of Orleans, Louisiana, against his immediate employer, Service Contracting, the vessel owner, California Company, and another

California Company contractor, Noble Drilling Corporation, respondent herein.

Petitioner concluded that he had no tenable claim against California Company and voluntarily dismissed that defendant. Then, prior to trial, petitioner compromised his claims against his employer, Service Contracting, but specifically reserved his rights against Noble Drilling Corporation, respondent herein.

Noble moved for summary judgment on the ground that the compromise with Service Contracting, notwithstanding the reservation of rights, also released Noble as a matter of law. This motion was granted and petitioner's suit against the remaining defendant below was dismissed. (Appendix "A").

Petitioner appealed to the Louisiana Court of Appeal, Fourth Circuit and that court affirmed the dismissal. (Appendix "B").

Petitioner then applied to the Louisiana Supreme Court for certiorari and that court refused the writ on June 30, 1967. (Appendix "C").

Hence this Petition has been filed.

## THE FEDERAL QUESTION

The injury involved in this litigation occurred in the Gulf of Mexico on the Outer Continental Shelf of the United States.

In *Pure Oil Company v. Snipes*, 293 F. 2d 60 (1961) the United States Court of Appeals, Fifth Circuit, held that federal maritime law, not state law, exclusively applies to such injuries.

In deciding the instant case, the State courts below sought to determine and apply federal maritime law principles. Indeed, they held specifically that federal law controlled the rights of the parties and dismissed petitioner's case solely upon the authority of *Romero v. Frank's Casing Crew, etc.*, 229 F. Supp. 41 (D.C., La., 1964) Aff'd, per curiam, 342 F. 2d 998 (CCA 5, 1964).

Therefore, the federal question in this case arises out of the subject matter of the litigation itself. Again, it is:

> Under federal maritime law, does the restricted release of one joint tortfeasor *ipso facto* release all others?

## REASONS FOR GRANTING THE PETITION

The state courts below have incorrectly decided a substantial and an important question of federal maritime law, not heretofore passed upon by this Honorable Court; moreover, in so doing, the state courts have followed and applied a federal court decision which has been subsequently ignored and expressly criticized by the court which authored it.

## ARGUMENT

As has been stated, the trial court and the Louisiana Court of Appeal, Fourth Circuit, both relied solely and only upon the authority of *Romero v. Frank's Casing Crew, supra,* to support their dismissal of petitioner's claim against the respondent herein.

*Romero* did involve the factual situation extant here, that is, the release by a seaman of his Jones Act employer and the attempted reservation of rights by the seaman against an alleged third-party joint tortfeasor. However, two additional factors existed in *Romero:* (1) the lower court in *Romero* found, presumably as a fact, that the seaman had recovered all the damages to which he was entitled *via* the settlement with his employer; and (2) the reservation of rights was actually held to be a *contra bones mores* device intended to enforce subrogation of the employer to the seaman's rights against the alleged third-party tortfeasor. Neither of these two factors is present in the instant case.

Significantly, we submit, neither of the above-mentioned factors existed in *Loffland Bros. Co. v. Huckabee,* 373 F. 2d 528 (CCA 5, 1967) wherein a seaman employed by Marine Catering Service settled with that employer and reserved his rights against Loffland Bros., a third-party whose position is absolutely indistinguishable from respondent's position in the instant case.

However, without even a mention of *Romero, supra,* the Court of Appeals, Fifth Circuit, in *Loffland* ap-

proved and permitted the identical course of action which petitioner, Newell Smith, Jr., sought to pursue in the instant case.

Similarly, little more than one month ago, the same Court of Appeals affirmatively decided the collateral question: May a seaman settle with an alleged third-party tortfeasor and reserve his rights against his employer? *Billiot v. Sewart Seacraft, Inc.* (No. 23,888, decided August 18, 1967, and printed in Appendix "D" hereof).

In *Billiot* the employer specifically relied on *Romero* and the Court of Appeals, Fifth Circuit, in rejecting the *Romero* result, said:

> *"We decline to follow that case, which is inconsistent with Loffland, because* the district court in *Romero relied on decisions which are inapposite to the question presented here,* namely, whether a plaintiff may sue his alleged employer-tortfeasor for damages after settling with an alleged third-party tortfeasor." (Emphasis added)

We submit that the distinction between *Romero* and *Billiot* is a factual distinction without a legal difference. The seaman in *Billiot* was permitted to settle with the third-party and still sue his allegedly jointly-liable employer. There is no sound reason why Newell Smith, Jr. should not be allowed to settle with his employer and proceed, at least for any deficiency, against the allegedly jointly-liable third-party, Noble Drilling Corporation. *Loffland Bros. Co. v. Huckabee, supra.*

*Romero, Loffland* and *Billiot* deal incongruously with an important admiralty law principle — the effect of a restrictive release in maritime personal injury cases; this Honorable Court should settle and resolve this issue for the benefit of all future litigants and their legal advisors.

## CONCLUSION

For the foregoing reasons this Petition for Certiorari should be granted, to the end that this Honorable Court will review the decisions below, hold that petitioner is entitled to his day in court against respondent and remand this cause to the Supreme Court of Louisiana with directions to review and reverse the judgment and decree of the Louisiana Court of Appeal, Fourth Circuit which erroneously affirmed the dismissal of petitioner's action.

All of which is

Respectfully submitted,

SAMUEL C. GAINSBURGH
ROBERT G. HEBERT

By: _____

SAMUEL C. GAINSBURGH
1718 National Bank of
Commerce Bldg.
New Orleans, Louisiana 70112
ATTORNEYS FOR
PETITIONER

Of Counsel:
KIERR and GAINSBURGH
New Orleans, Louisiana

## CERTIFICATE

I, the undersigned member of the Bar of this Honorable Court, do hereby certify that copies of the above and foregoing Petition for Certiorari have been served upon respondent, Noble Drilling Corporation, by depositing the same, postage prepaid, in the United States mail, addressed to George V. Baus, Esq., c/o Adams and Reese, Attorneys at Law, 847 National Bank of Commerce Building, New Orleans, Louisiana, 70112, at New Orleans, Louisiana, this ____ day of September, 1967.

---

Samuel C. Gainsburgh
1718 National Bank of
Commerce Bldg.
New Orleans, Louisiana 70112

**APPENDIX "A"**

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA
DIVISION "C"

No. 424-272 DOCKET #4

NEWELL H. SMITH, JR.
VERSUS
SERVICE CONTRACTING, INC.,
NOBLE DRILLING CO., et al

REASONS FOR JUDGMENT

After considering the pleadings and argument of counsel, the Court concludes that the motion to strike the third party petition herein is governed by the decision of *Halcyon v. Haenn Ship Ceiling and Refining Corp.*, 342 U.S. 282, 96 L. Ed. 318 (1952), holding that there is no right of contribution nor indemnity in cases of this nature; accordingly, the motion will be granted. The Court further concludes that the motion for summary judgment dismissing the plaintiff's petition is controlled by the decision of Romero v. Frank's Casing Crew and Rental Tools, Inc., 229 F. Supp. 41, (D.C., La. 1964), affirmed 342 F.2d 999, (C.A. 5, 1964), holding that a monetary settlement coupled with a dismissal of claim against one alleged tortfeasor, in a case of this nature, will bar prosecution of all claims against any other alleged tortfeasor, regardless of whether or not the amount received in said settlement actually constitutes

full compensation for plaintiff's damages; this Court is not in agreement with that decision, as the legal issue raised therein appears to be that of credit against judgment rather than election of remedies, but this Court considers the decision a ruling case in the maritime field, accordingly the motion will be granted. Judgment will be entered accordingly.

/s/ FRED J. CASSIBRY
JUDGE

New Orleans, Louisiana
July 7, 1966.

## APPENDIX "B"

No. 2,571

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

NEWELL H. SMITH, JR.
VERSUS
SERVICE CONTRACTING, INC.,
THE CALIFORNIA COMPANY,
NOBLE CASUALTY COMPANY
AETNA CASUALTY & SURETY CO.,
and LIBERTY MUTUAL INS. CO.

APPEAL FROM THE CIVIL DISTRICT COURT FOR
THE PARISH OF ORLEANS, No. 424,272,
DIVISION "C",
HONORABLE FRED J. CASSIBRY, JUDGE.

L. JULIAN SAMUEL
JUDGE

May 1, 1967

(Court composed of Judges L. Julian Samuel,
Paul E. Chasez and Chris T. Barnette)

WILLIAM P. RUTLEDGE, for plaintiff-appellant.

ADAMS AND REESE,
GEORGE V. BAUS, for defendants-appellees, and third party plaintiff-appellant.

*AFFIRMED.*

INITIALS:
L.J.S.
P.E.C.
C.T.B.

This litigation was commenced when Newell H. Smith, Jr., the present plaintiff, filed a libel in the United States District Court for the Eastern District of Louisiana, New Orleans Division, against Service Contracting, Inc., The California Company and (by amendment) Noble Drlling Company. The libel was brought pursuant to the provisions of the Jones Act and the general maritime law of the United States. It sought damages for injuries allegedly sustained by the libelant on December 11, 1962, on a stationary oil drilling platform located in the Gulf of Mexico off the coast of Louisiana and also sought maintenance and cure in a separate cause of action against Service.

Smith had accepted and received payments from Service's insurer for the same accident alleged in the libel and a compensation award had been made by the Deputy Commissioner under the Outer Continental Shelf Lands Act, 43 U.S.C.A. §1333 (c), which incorporates the remedies of the Longshoremen's and Harbor Workers' Compensation Act for employees injured while conducting operations on the Outer Conti-

nental Shelf of the Gulf of Mexico. Basing its motion on the acceptance of those benefits and that award, and the fact that Smith had allowed the award to become final without appealing therefrom, Service moved for summary judgment against the libel on the grounds of res judicata and collateral estoppel. After a hearing on the motion the Federal District Court held that the making and acceptance of the compensation award did not bar Smith from asserting his claim against Service. That reported decision is *Smith v Service Contracting, Inc.*, 236 F. Supp. 492.

In an attempt to obtain a quicker disposition of his claims, Smith filed the instant suit in the Civil District Court for the Parish of Orleans for the same injuries, damages and maintenance and cure as were involved in the libel. Named defendants herein are the same parties who had been made respondents in the libel and Aetna Casualty & Surety Company and Liberty Mutual Insurance Company, respective insurers of Noble and Service. Plaintiff then dismissed his federal court action as of non-suit and without prejudice. Subsequently he voluntarily dismissed California from this suit and the only remaining defendants were Noble, Service, Aetna and Liberty.

During May of 1965, after California had been dismissed from the suit, plaintiff entered into a compromise with Service and Liberty by which, in consideration of the sum of $20,500 additional to the approximate amount of $3,500 previously paid to him by Liberty, he released and discharged Service, Liberty and California from any and all liability arising out of the

accident upon which this suit is based. In the compromise plaintiff specifically reserved all of his rights against Noble and Aetna.

After that compromise had been effected Noble and Aetna sought to remove the case to the federal court on the basis of diversity of citizenship. However, the case was remanded to the state court by the federal court on the ground that it was a Jones Act suit which is not removable.

Following the remand to the Civil District Court Noble filed a third-party complaint against Service and Liberty seeking judgment over and against those third-party defendants in the event of judgment in favor of the original plaintiff and against Noble. Other pleadings were filed in connection with the third-party petition. But in view of the conclusion we have reached we find it unnecessary to discuss that petition or those other pleadings.

Pertinent here is the filing by Noble and Aetna of a motion for summary judgment against the plaintiff. The motion is based primarily on the contention that having recovered once for his injuries in the compromise and release of his claims against Service, Liberty and California, plaintiff cannot recover again from Noble and Aetna for the same injuries despite the reservation of his rights against Noble and Aetna.

After a hearing on the rule to show cause why the same should not be granted, the trial court rendered a summary judgment dismissing plaintiff's suit against

Noble and Aetna. Plaintiff has prosecuted this appeal therefrom. In this court Noble and Aetna contend for the first time (no objection was made thereto in the trial court) that the state courts have no jurisdiction over the subject matter of this suit for the reason that the Outer Continental Shelf Lands Act vests such jurisdiction exclusively in the federal courts, citing *Gravois v Travelers Indemnity Company,* 173 So.2d 550.

Addressing ourselves first to the jurisdictional question, we note that the failure of Noble and Aetna to object to the jurisdiction prior to appeal is immaterial. Under LSA-C.C.P. Art. 3 jurisdiction of a court over the subject matter of an action, unlike jurisdiction over the person (LSA-C.C.P. Arts. 6 and 7), cannot be conferred by consent of the parties. However, we are of the opinion that the Courts of the State of Louisiana do have jurisdiction over the subject matter in the instant case.

Plaintiff's petition alleges he was employed by the defendants (Service, California and Noble) as a member of the crew of the motor vessel S-24 which was being jointly operated by the defendants as a tender in oil drilling operations in the Gulf of Mexico; in compliance with orders he went upon the drilling platform which the vessel was tending for the purpose of unloading equipment from the vessel to the platform; and he sustained the injuries for which he filed this suit while on the platform during that unloading operation. From the record before us we are satisfied plaintiff was a seaman, a member of a crew of a vessel, and covered by the Jones Act, 46 U.S.C.A. §688, at the time

he sustained the injuries for which he sues. The case has not been tried on the merits and the record does not establish, as Noble and Aetna contend, that plaintiff was employed only by Service and not by the other defendants.

In view of the fact that on two occasions during the course of this litigation the federal court has found plaintiff was a seaman covered by the Jones Act, we consider unnecessary a further discussion of that question. The two occasions on which the Federal District Court so found involved the motion for summary judgment by Service (*Smith v Service Contracting, Inc., supra*) and the remand of this case to the Civil District Court as a result of the attempt by Noble and Aetna to remove the same to the federal court on the basis of diversity of citizenship.

The Outer Continental Shelf Lands Act, 43 U.S.C.A. §1333 (c)(1), specifically excludes members of a crew of a vessel from coverage. *Gravois*, the case relied on by appellees, is not apposite here. For as the majority opinion carefully points out, the Jones Act was not there applicable. The person for whose death recovery was sought in that suit was not a seaman; he was a member of an installation crew working on a fixed structure in the Gulf of Mexico belonging to his employer, Freeport Sulphur Company. Here the Jones Act, which affords recovery for injury to seamen, and the "saving to suitors" clause of 28 U.S.C.A. §1333 (1), which provides for exclusive jurisdiction in the District Courts of the United States in civil cases of admiralty or maritime jurisdiction ". . . saving to suit-

ors in all cases all other remedies to which they are otherwise entitled", are applicable. And, the plaintiff having elected to pursue his remedy in the Court of the State of Louisiana, those courts do have jurisdiction. Engle v Davenport, 46 S.Ct. 410, 271 U.S. 33; Panama R. Co. v Vasquez, S.Ct. 596, 271 U.S. 557; Red Cross Line v Atlantic Fruit Co., 44 S.Ct. 274, 264 U.S. 109; Sidney v Lykes Bros. S.S. Co., 8 So.2d 550; 2 C.J.S. Admiralty §7, 8; 32 Tul. L. Rev. p. 175.

The trial court based its rendition of the summary judgment appealed from on *Romero v Frank's Casing Crew & Rental Tools, Inc.*, 229 F.Supp. 41 (1964), *aff'd*, 342 F.2d 999 (1964). In *Romero* plaintiff brought suit under the Jones Act and the general maritime law against his former employer and its insurance carriers for injuries allegedly sustained while working on a drilling barge in the Gulf of Mexico, joining with those demands a claim for maintenance and cure. Previously he had filed a suit for the same accident against Union Oil Company of California and its drilling contractor, the Offshore Company, for full indemnity by way of damages for all losses resulting from the same injuries. He dismissed that prior suit after compromising his claims against Union and Offshore. In the compromise plaintiff released his claims against Union, Offshore, a second oil company, and their insurers and subrogated the released parties to his claims against Frank's, the defendant in the cited case, and its insurers up to the amount received by him in the compromise with the understanding that he might proceed against Frank's and its insurers as to his claims against them. First assuming that plaintiff was a sea-

man, the federal courts held that, his rights being cumulative, he could recover only once for the one injury and accordingly rendered judgment dismissing his suit against his former employer and its insurers.

Appellant concedes there is no issue as to material fact involved in the motion for summary judgment now before us and that the only question presented by his appeal is whether movers, Noble and Aetna, are entitled to such a judgment as a matter of law. He also concedes the rule of *Romero* is the prevailing federal jurisprudence on the subject and that, on the material facts here involved, the instant case cannot be distinguished from *Romero*.

Under these circumstances we must affirm the judgment appealed from. For where, under the "saving to suitors" clause, a Jones Act suit is brought in a state court, the substantive law to be applied is that which would have been applicable had the action been brought in an admiralty court; the state court is bound by the jurisprudence of the federal courts under the Jones Act. Macomber v DeBardeleben Coal Co., 200 La. 633, 8 So.2d 624; Ursich v daRosa, 328 F.2d 794; 2 Am.Jur. 2d, Admiralty §105, 106.

The judgment appealed from is affirmed.

*AFFIRMED.*

## APPENDIX "C"

SUPREME COURT OF LOUISIANA
New Orleans, 70112

Newell H. Smith, Jr. June 30, 1967
v.
Service Contracting, Inc., et al No. 48,795

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In re: Newell H. Smith, Jr., applying for certiorari, or writ of review, to the Court of Appeal, Fourth Circuit, Parish of Orleans

---

Writ refused.

There is no error of law in the judgment of the Court of Appeal.

/s/ JWS
/s/ JBF
/s/ JBH
/s/ FWH
/s/ EHMcC
/s/ WBH
/s/ FWS

---

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans, June 30, 1967
/s/ HAROLD A. MAISE, JR.
Deputy Clerk

## APPENDIX "D"

In The
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

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No. 23888

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MRS. CHESTER BILLIOT, Individually and as Administratrix of the Estate of her Minor Daughter, Kathy Ann,

Appellant,

versus

SEWART SEACRAFT, INC.

Appellee.

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*Appeal from the United States District Court for the Western District of Louisiana.*

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(August 18, 1967.)

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Before HUTCHESON and GODBOLD, Circuit Judges, and NEOL, District Judge.

HUTCHESON, Circuit Judge: This appeal is from a dismissal by summary judgment of the libel instituted by appellant to recover damages for the death of her husband. We reverse the summary judgment and remand.

Appellant, the administratrix of the estate of her husband, Chester Billiot, originally filed this action in the court below against Sewart Seacraft, Inc. and J. Ray McDermott & Co., Inc. to recover damages for Billiot's death. She claimed a right to recover for herself and for her minor daughter. The complaint alleged that the injury occurred while decedent, a seaman working on a towboat owned by Seacraft, was engaged in refueling the towboat from a barge belonging to McDermott. It was claimed that the decedent "slipped and fell or was thrown" from either the barge or the towboat when a ship, also owned by McDermott and tied to the barge, suddenly moved away from it, causing a slack line to become taut and strike the decedent. He was taken to a hospital where he died a week later. The complaint stated that the injury happened within the Louisiana state maritime boundaries. The asserted liability of Seacraft and McDermott was predicated upon the negligence of both and the unseaworthiness of their vessels, the towboat and barge respectively. The complaint in addition sought damages for Billiot's pain and suffering before he died.

Before the suit came on for trial, the appellant filed another complaint in a Louisiana state court. That complaint is not in the record, but it apparently was similar to the one filed in the court below except that it named several other defendants in addition to Seacraft and McDermott. In advance of trial in the state court, the appellant settled all her claims against McDermott and some of the other defendants, not includ-

ing Seacraft, for $21,075. The general release received by McDermott expressly reserved all rights against Seacraft. Thereupon the appellant dropped McDermott from the action filed in the court below.

When the appellant returned to the court below to assert the reserved claims against Seacraft, the district court granted Seacraft's motion for summary judgment, relying solely on the appellant's settlement with McDermott. Apparently the court was of the opinion that the settlement operated as a matter of law to fully satisfy the appellant for all claims arising out of Billiot's death and that any further amounts recovered from Seacraft therefore would give her an impermissible double recovery of damages. We agree that the appellant should not be allowed to obtain a double recovery, but under the facts of this case, we feel that, in restricting the appellant's recovery as a matter of law to a settlement with one of the two alleged tortfeasors, the district court may have denied appellant her right to receive adequate compensation.

The release effectively reserved appellant's rights against Seacraft. We see no reason why appellant should not be permitted to sue Seacraft and obtain a verdict for the total damages caused by Seacraft, if any. A double recovery may be prevented by deducting the amount of the settlement payment from

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[1]Contrary to the old common-law rule, today a release intending to save the releasor's rights does not automatically surrender those rights. Aro Mfg. Co., Inc. v. Convertible Top Replacement Co., Inc., 377 U.S. 476, 501 (1964). See also Petroleum Carrier Corp. v. Carter, 233 F.2d 402, 404 (5th Cir. 1956).

the total damages. Judgment then may be awarded to appellant for the balance. The procedure should fully compensate the appellant while not providing her with unjust enrichment.

This procedure has been used successfully in suits based on negligence in other areas of the law, see, e.g., *State Farm Mut Auto. Ins. Co. v. Bourne*, 220 F.2d 921 (5th Cir. 1955); *Cudd v. Great Amer. Ins. Co.*, 202 F. Supp. 237 (W.D.La. 1962),[2] and we recently approved its use in a maritime tort case quite similar to the one before us. *Loffland Bros. v. Huckabee*, 373 F.2d 528 (No. 22960, March 2, 1967).

In *Loffland*, three suits brought by an injured seaman were consolidated. In two separate complaints, the plaintiff had sued his employer under different causes of action, for negligence under the Jones Act, 46 U.S.C. Sec. 688, and for maintenance and cure. The third suit, against Loffland, alleged negligence and unseaworthiness under the general maritime law. In advance of trial, the plaintiff settled all the claims against his employer for $11,000. Rather than holding that this settlement was all that the plaintiff was entitled to receive for his injuries, the court allowed the claim for damages against Loffland to proceed to trial. The jury found that Loffland was liable to the plaintiff for $42,500. In order to prevent an unjust double recovery of damages, the judge credited

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[2]See also Sylvania Elec. Prods., Inc. v. Barker, 228 F.2d 842 (1st Cir. 1955), cert. denied, 350 U.S. 988 (1956); McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943).

this verdict with the $11,000 payment plaintiff had received from his employer. Judgment was given for the balance of $31,500. On appeal by Loffland, the plaintiff filed a cross-appeal challenging the procedure by which the court reduced the verdict by the amount of the settlement. We affirmed the judgment of the district court, thereby approving the method which we now hold should have been used in the case at bar.

In granting summary judgment, the court below relied on *Romero v. Frank's Casing Crew & Rental Tools, Inc.*, 229 F. Supp. 41, aff'd per curiam, 342 F. 2d 999 (5th Cir. 1965), also decided by that court. We decline to follow that case, which is inconsistent with *Loffland*, because the district court in *Romero* relied on decisions which are inapposite to the question presented here, namely, whether a plaintiff may sue his alleged employer-tortfeasor for damages after settling with an alleged third-party tortfeasor.[3] *Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d 525 (9th Cir. 1962); *McCarthy v. American Eastern Corp.*, 175 F.2d 127 (3d Cir. 1940), cert. denied, 333 U.S. 991 (1950); *Muise v. Abbott*, 160 F.2d 590 (1st Cir. 1947); *Smith v. Lykes Bros.-Ripley S.S. Co.*, 105 F. 2d 604 (5th Cir.), cert. denied, 308 U.S. 604 (1939). These decisions consider only the question whether a seaman, after recovering a judgment against his

---

[3]Moreover, *Romero* is distinguishable in one respect in that there the settling alleged tortfeasor was subrogated to the seaman's claims against his employer. The court refused to enforce such a subrogation on the ground that it was against public policy. In the case before us, the appellant did not subrogate McDermott to her claims against Seacraft.

employer based on the latter's negligence, can sue the same employer a second time under a separate and different cause of action for maintenance and cure. The question frequently arises because some items of loss, such as wages, may be recovered either as damages under a negligence claim or under a claim for maintenance and cure. See *Vickers v. Tumey*, 290 F.2d 426, 435 (5th Cir. 1961). Of course the same item may not be recovered twice under separate causes of action.[4] *Pacific Steamship Co. v. Peterson*, 278 U.S. 130 (1928). Whether the item is recoverable in the second suit depends on a resolution of the factual issue whether, under the facts of each case, the item was included in the recovery of the first suit. But these cases do not have any bearing upon the general rule that an injured person may partially settle a negligence claim with one of two alleged tortfeasors, sue and obtain a verdict for total damages against the nonsettling alleged tortfeasor, and receive judgment for the difference between the total damages and the settlement. *Loffland Bros. Co. v. Huckabee*, — F.2d —, *supra*; *Cudd v. Great Amer. Ins. Co.*, *supra*; *State Farm Mut. Auto. Ins. Co. v. Bourne*, *supra*.

Guidance as to the causes of action available to the appellant on remand if found in *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964). There the Supreme Court adhered to its decision in *Lind-*

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[4]Muise v. Abbott, supra, involves the same principle. There the seaman first settled a negligence claim with an alleged third-party tortfeasor and then sued his employer under a separate cause of action for maintenance and cure.

*gren v. United States*, 281 U.S. 38 (1930), which had held that "in passing Sec. 23 of the Merchant Marine Act, 1920, now 46 U.S.C. Sec. 688 (1958 ed.), commonly called the Jones Act, Congress provided an exclusive right of action for the death of seamen killed in the course of their employment, superseding all state death statutes which might otherwise be applied to maritime deaths, and, since the Act gave recovery only for negligence, precluding any possible recovery based on a theory of unseaworthiness." 379 U.S. at 154. See also *Hassan v. A. M. Landry & Son., Inc.*, 321 F.2d 570, 571 (5th Cir. 1963), cert. denied, 375 U.S. 967 (1964). But see *Kenney v. Trinidad Corp.*, 349 F.2d 832, 840-841 (5th Cir. 1965) (dictum), cert. denied, 382 U.S. 1030 (1966). Furthermore, the Court noted that under Sec. 1 of the FELA, 45 U.S.C. Sec. 51, a right of recovery of damages for death is provided for the benefit of the surviving widow and children of a deceased employee. 379 U.S. at 156. And, the estate may claim damages for pain and suffering under a state survival statute preserving a "cause of action for unseaworthiness, which would not survive under the general maritime law." Id. at 157. These causes of action, since authorized by the Jones Act, are available to appellant against Seacraft only if the latter was decedent's employer, which Seacraft denies.[5]

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[5]Since the complaint alleges that the injury occurred within Louisiana's maritime boundaries, reliance on the Death on the High Seas Act, 46 U.S.C. Secs. 761-767, would seem to be foreclosed even if that Act would otherwise be available in view of Gillespie. See Doyle v. Albatross Tanker Corp., 367 F.2d 465 (2d Cir. 1966).

If the trial is to be a jury, we think that the better procedure is to withhold evidence of the settlement from the jury which will determine the total damages, if any, caused by Seacraft. The trial judge will deduct from the verdict the settlement payment to arrive at the amount which will adequately compensate the appellant.[6]

REVERSED AND REMANDED WITH DIRECTIONS.

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[6] "We can say positively when [this] method is employed, that the jury has brought in a verdict in an amount which they believe will adequately and justly compensate the plaintiff, that the proper deduction has been made because the Judge himself in the judgment makes the proper deduction."

"The other method would be to place evidence before the jury, with instructions to render a verdict, less the amount received. It occurs to us that this latter procedure. . . . [is undesirable] because, who would be able to positively say if the latter method were adopted, that the jury actually estimated the injury to the plaintiff and then deducted what he had already received." State Farm Mut. Auto. Ins. Co. v. Bourne, supra, at 923.